Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

ASSOCIATION FOR RETARDED CITIZENS OF NORTH DAKOTA, et al.,

Petitioner,

v.

EDWARD T. SCHAFER, Governor of the State of North Dakota, et al.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

BRUCE JOHNSON
107 Roberts Street North
Fargo, ND 58102
Telephone: (701) 235-6411
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

39 pp

QUESTION PRESENTED

The instant action, which was commenced in 1980, focused upon the denial of rights afforded to institutionalized persons with mental retardation and related disabilities. The plaintiffs obtained broad injunctive relief and were determined to be prevailing parties. *Association for Retarded Citizens of North Dakota v. Olson,* 561 F.Supp. 473 (D.N.D. 1981), *aff'd,* 713 F.2d 1384 (8th Cir. 1983). The injunction was dismissed in 1995 after the district court found that the lawsuit had forced the defendants to change "from an embarrassing lack of appropriate attention to its responsibilities to become a forward looking provider of the most promising methods and mechanisms to benefit those whom it once ignored." *Association for Retarded Citizens of North Dakota v. Schafer,* 872 F.Supp. 689, 708 (D.N.D. 1995). The district court awarded the plaintiff class (hereinafter "ARC") attorney fees for time expended primarily in 1993 in connection with the final hearings to determine whether the injunction should be dismissed. In awarding fees, the district court held that ARC had achieved complete success in the overall litigation, and that the time expended by plaintiffs' counsel was reasonable and necessary. The appellate court vacated the fee award when it found that ARC did not prevail in those hearings, despite the fact that ARC had prevailed in the overall litigation. The question presented here is: whether a post-judgment fee award is governed by the "reasonable and necessary" standard enunciated in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546 (1986) or by the restrictive

QUESTION PRESENTED – Continued

"success" standard enunciated in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) as applied by the appellate court which would require a party who has achieved complete success in the overall litigation to separately prevail at each stage of compliance proceedings.

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PETITION FOR WRIT OF CERTIORARI

ARC respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on May 15, 1996, in order to resolve the conflict between the Eighth and First, Fourth, Seventh, Tenth and Eleventh Circuit Courts of Appeals on the important issue presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit that gives rise to this petition is found at *Association for Retarded Citizens of North Dakota v. Schafer*, 83 F.3d 1008 (8th Cir. 1996). It is reprinted in App. A hereto at page A-1. By order filed June 25, 1995, the Eighth Circuit denied the Petition for Rehearing and Suggestion for Rehearing En Banc. App. B. The two district court decisions that gave rise to the appeal are reprinted in App. C.

JURISDICTION

On October 4, 1993, the United States District Court for the District of North Dakota issued a memorandum decision awarding attorney fees and costs to the plaintiff class for post-judgment services under 42 U.S.C. § 1988 (1994). Judgment was entered for the fee award on February 7, 1995. An appeal was timely taken from the judgment and the judgment was vacated by the United States

Court of Appeals for the Eighth Circuit. On June 25, 1996, the Eighth Circuit denied the motion for rehearing filed by ARC. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1) (1993).

STATUTES INVOLVED IN THIS CASE

The Civil Rights Attorney Fee Act, as amended, provides:

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title,[1] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

The district court awarded $202,335.15 to ARC in attorney fees, expert fees, and costs for the work required during the final phase of the litigation. In so doing, the district court made the following findings: (1) plaintiffs

[1] So in original.

were prevailing parties in this action; (2) plaintiffs had achieved complete success; (3) plaintiffs' counsel was ethically obligated to represent the interests of class members during the proceedings; (4) the hours expended by counsel were reasonable and necessary; and (5) the costs expended were necessary and properly compensable.

The Eighth Circuit reversed the district court decision and vacated the entire award, holding that the prevailing party analysis of *Hensley v. Eckerhart*, 461 U.S. 424 (1983) applied to post-judgment proceedings, and that because ARC had not separately succeeded during the final compliance hearings, ARC was not entitled to a fee award for work performed, even though ARC had achieved complete success in the overall litigation.

Plaintiffs' Petition for Rehearing was denied on June 25, 1996.

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S OPINION CONFLICTS WITH DECISIONS FROM THE FIRST, FOURTH, SEVENTH, TENTH AND ELEVENTH CIRCUITS AND IS CONTRARY TO THE POLICIES EMBODIED IN THE CIVIL RIGHTS ATTORNEY FEE ACT.

The decision below is in direct conflict with the following decisions holding that post-judgment activities by a prevailing party are compensable if reasonable and necessary, even when those activities are not successful: *Joseph A. by Wolfe v. New Mexico Dept. of Human Services*, 28 F.3d 1056 (10th Cir. 1994); *Plyler v. Evatt*, 902 F.2d 273

(4th Cir. 1990); *Ustrak v. Fairman*, 851 F.2d 983 (7th Cir. 1988); *Brewster v. Dukakis*, 786 F.2d 16 (1st Cir. 1986) (refusing to adopt "but for" success standard); *Turner v. Orr*, 785 F.2d 1498 (11th Cir. 1986). Certiorari is appropriate here. *See also, Acosta v. Louisiana Dept. of Health & Human Resources*, 478 U.S. 251, 253 (1986) (Court granted petition to resolve conflicting interpretations of rule).

Courts have generally recognized that the degree of success is not a singularly dispositive factor in cases involving post-judgment activities where the plaintiff has previously prevailed. The seminal case on post-judgment fees is *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), which held that a prevailing party was entitled to fees so long as the work was found to be "useful and necessary." *Id.* at 550-53. Significantly, in *Delaware Valley* the plaintiffs became involved in state court litigation in order to protect a federal decree. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. at 553, n. 1. The plaintiffs lost the state court litigation and were awarded fees because, even though the state court effort was unsuccessful, the plaintiffs had prevailed in the federal action and the unsuccessful state court effort was found to be useful and necessary. *Id.* at 561.

The *Delaware Valley* standard is consistent with the purpose of 42 U.S.C. § 1988 because it recognizes the critical role played by counsel in post-judgment proceedings. As stated in *Plyler v. Evatt*, 902 F.2d 273, 280 (4th Cir. 1990):

> Plaintiff class had no option but to incur the related costs; plaintiffs' counsel were under clear obligation to make the defensive effort. *See*

> *Ustrak v. Fairman*, 851 F.2d 983, 990 (7th Cir. 1988) (civil rights plaintiff was entitled to fees in connection with largely unsuccessful appellate defense because "he had no choice but to incur them or forfeit his victory in district court"). To deny attorney fees for such an effort, whether successful in detail or not, would obviously thwart the underlying purpose of the attorney fee provision of 42 U.S.C. § 1988.

The "reasonable and necessary" standard for post-decree fee awards was followed before *Delaware Valley*. *See Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 560, 566 (1986) (citing cases). The standard has been consistently followed since *Delaware Valley* as well. *See Joseph A. by Wolfe v. New Mexico Dept. of Human Services* 28 F.3d 1056 (10th Cir. 1994); *Stewart v. Gates*, 987 F.2d 1450 (9th Cir. 1993); *Diaz v. Romer*, 961 F.2d 1508 (10th Cir. 1992); *Duran v. Carruthers*, 885 F.2d 1492 (10th Cir. 1989); *Ustrak v. Fairman*, 851 F.2d 983 (7th Cir. 1988); *Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292 (11th Cir. 1988); *Keith v. Volpe*, 833 F.2d 850 (9th Cir. 1987).

By requiring a party to succeed at each stage of implementing injunctive relief in order to be entitled to any additional fee, the appellate court creates the prospect of protracted litigation over the degree of post-judgment success achieved by a party who has previously attained prevailing party status. The mere prospect of such a multitude of trials left one court "traumatized." *Brewster v. Dukakis*, 786 F.2d 16, 18 (1st Cir. 1986).

Delaware Valley provides the better reasoned approach. Once a party has prevailed, a party must be able to fully test claims of compliance through efforts

which are reasonable and necessary, consistent with the role of the adversarial system. If a prevailing party may only be compensated for compliance efforts which are ultimately successful, civil rights plaintiffs will be denied equal and effective representation during the compliance phase because all claims will be abandoned except those which are guaranteed to be fully successful.

II. THE APPELLATE COURT DECISION CONFLICTS WITH RELEVANT DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

The appellate court decision here conflicts with *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986) which found that post-decree activities are compensable, even if unsuccessful, where the activities are useful and necessary. Here, the district court specifically found the services to be reasonable and necessary. The appellate court decision does precisely what the Supreme Court refused to do in *Delaware Valley*, it vacates a fee award to a party who had prevailed in the overall litigation merely because the post-decree activity was not ultimately successful.

Additionally, the appellate court decision conflicts with *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Here, the district found that ARC had achieved "complete success." *Association for Retarded Citizens of North Dakota v. Schafer*, 872 F.Supp. 689, 715 (D.N.D. 1995). The appellate court did not disagree with this finding but nonetheless vacated the fee award because ARC did not prevail at the final hearings. *Association for Retarded Citizens of North Dakota v. Schafer*, 83 F.3d 1008, 1011 (8th Cir. 1996). Under

Hensley, "complete success" in the overall litigation would require a fully compensatory fee. *Hensley v. Eckerhart*, 461 U.S. at 435, 440.

Hensley also holds that the award of any attorney fee to a prevailing party is the function of the district court, and that appellate review is limited. *Hensley v. Eckerhart*, 461 U.S. at 437. The appellate court exceeded the proper scope of review by disregarding the district court's factual finding that the services performed were reasonable, necessary and ethically required, and instead substituted a separate factual finding that the services were not necessary because only a limited effort was required. *See also, Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986) (appellate court may not create factual finding). Consistent with this excess, the appellate court refused to remand the case to the district court for the determination of a reasonable fee, but instead invaded the province of the district court by making the determination itself.

In cases involving injunctive relief, the injunction will eventually be complied with and the injunction must be dismissed. If the appellate decision stands here, a prevailing party who has been denied civil rights must suffer further damage by absorbing the attorney fees incurred when the claims of full compliance are properly tested through the adversarial process. Prevailing parties would effectively be forced to raise only a "limited" defense to an adversary's claim of full compliance due to the risk of nonpayment. The Civil Rights Attorney Fee Act does not condone any less than competent representation for disabled class members simply because fees are to be paid by the parties who were previously found to have deprived class members of their civil rights.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BRUCE JOHNSON
107 Roberts Street North
Fargo, ND 58102
Telephone: (701) 235-6411
Attorneys for Petitioners

APPENDIX A

ASSOCIATION FOR RETARDED CITIZENS OF NORTH DAKOTA; Lindley Black, by his father, Sidney Black; Bradley Cossett, by his mother, Denise Cossett; Richard Schneiderhan, by his mother, Elmira Schneiderhan; Naomi Jordison, by her father, Timothy Jordison; Kelli Moriarty, by her mother, Jacquelyn Moriarty; Phillip Dechant, by his mother, Lois Dechant, on behalf of themselves and all others similarly situated, Plaintiffs – Appellees,

v.

Edward T. SCHAFER, Governor of the State of North Dakota; Charles Mertens; Wanda Kratochvil; Dr. Jon Rice; Sam Ismir; Sandi Noble; Reuben Guenthner; Wayne Sanstead; Gary Gronberg; Henry Wessman; Gene Hysjulien; Yvonne Smith, Defendants – Appellants.

No. 95-1496.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 16, 1995.

Decided May 15, 1996.

Sara Beth Gullickson, Fargo, ND, argued, for appellants.

Michael James Williams, Fargo, ND, argued, for appellees.

Before McMILLIAN, LOKEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

LOKEN, Circuit Judge.

This is a class action challenging the State of North Dakota's programs and facilities for the mentally

retarded. The district court issued a broad permanent injunction in 1982, and we affirmed. Association for Retarded Citizens v. Olson, 561 F.Supp. 473 (D.N.D.1982), *aff'd*, 713 F.2d 1384 (8th Cir.1983). However, in 1991 we held that the Eleventh Amendment as construed in Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), precludes those portions of the injunction that enforced state law, and we remanded for consideration of whether the State now complies with federal law. Association for Retarded Citizens v. Sinner, 942 F.2d 1235 (8th Cir.1991). In remanding, we noted:

> [T]he State argue[s] that Pennhurst requires this action be terminated because the State is now in compliance with all federal constitutional and statutory requirements. In support of its position, the State has offered affidavit evidence . . . that all systemic constitutional violations that may have existed at the start of this litigation have been eliminated. Although appellees have contested some of these assertions, our review of the record suggests that the State has presented a prima facie case of current compliance, particularly under the changed legal environment of Youngberg [v. Romeo, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982),] and Pennhurst.

942 F.2d at 1240.

On remand, after broadly defining plaintiffs' rights under federal law, the district court appointed a Panel of Special Masters "to receive and evaluate such evidence as the parties present" and to file a report with the court concerning the State's motion to terminate the injunction.

After nine months of hearings, the Panel recommended that the injunction be terminated and the case dismissed. The district court adopted the Panel's Report in its entirety and directed entry of judgment dissolving all outstanding injunctive orders. However, the court also awarded plaintiffs substantial costs, attorney's fees, and expert fees for their work in opposing the State's motion to terminate the injunction. The State appeals, contesting $202,335.15 of the amount awarded. Concluding that the contested services were not reasonably expended by the prevailing party, as required by Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), we reverse.

I.

In federal civil rights litigation, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). There can be no doubt that plaintiffs initially prevailed in this lawsuit. See ARC v. Olson, 713 F.2d at 1395-96, reducing the initial attorney's fee award. The State paid substantial fee awards for the period 1980 through 1992. At issue here are fee requests for 1993-1994, a period following the district court's appointment of the Special Masters Panel. The State has paid $113,835.65 of the amounts requested without objection. It appeals the award of additional claims for $124,405 in attorney's fees and $77,931.15 in costs and expert fees.

The district court granted these requests in full, concluding (i) plaintiffs are still prevailing parties; (ii) the requested attorney's fees are "the product of reasonable

hours times a reasonable rate" and "there is no need to adjust the fee"; and (iii) an award of expert fees is expressly authorized by § 1988(c), first enacted in 1991. On appeal, the State argues that plaintiffs are not "prevailing parties" for purposes of this award, and also that the amount of fees awarded is unreasonable.[1] We review an award under fee-shifting statutes for "an abuse of discretion or an error in implementing the governing legal standards." McDonald v. Armontrout, 860 F.2d 1456, 1458 (8th Cir.1988).

II.

Complex civil rights cases seldom end with the grant of a permanent injunction. The injunction must be implemented, that process must be monitored, and lingering or new disputes over interpretation of the decree must often be presented to the court for resolution. These functions take time and effort by the prevailing party's attorney. Therefore, it is generally accepted that prevailing plaintiffs are entitled to post-judgment fee awards for legal services necessary for reasonable monitoring of the decree. See Stewart v. Gates, 987 F.2d 1450, 1452 (9th

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[1] The State also raises other issues: that § 1988(c) does not authorize an expert fee award because plaintiffs did not assert or prove claims under 42 U.S.C. § 1981 or § 1981a; that the expert fee award is not authorized under other statutes invoked by plaintiffs, 20 U.S.C. § 1415(e)(4)(B), the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq., and 29 U.S.C. § 794; and that the district court retroactively applied § 1988(c), violating Landgraf v. USI Film Prods., ___ U.S. ___, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). Given our view of the case, we need not take up these important issues.

Cir.1993); Garrity v. Sununu, 752 F.2d 727, 738 (1st Cir.1984).[2]

However, not all post-judgment efforts are compensable. First, when "claims distinctly different from the underlying lawsuit" arise after resolution of the main civil rights issues, plaintiffs must prevail on these unrelated claims to be entitled to a fee award for the post-judgment work. Willie M. v. Hunt, 732 F.2d 383, 386 (4th Cir.1984). Second, compensable post-judgment work must in any event be reasonable and necessary, measured by the Hensley v. Eckerhart standard that requires balancing the amount of effort against plaintiffs' overall success. Like the Tenth Circuit, we reject the notion that fee awards "in a post-decree monitoring setting . . . are immune from the possibility of reduction under the principles of Hensley." Joseph A. v. New Mex. Dept. of Human Servs., 28 F.3d 1056, 1060 (10th Cir.1994).

The district court failed to conduct this analysis. True, the court applied the familiar "lodestar" approach and found that the number of hours and the hourly rate submitted by plaintiffs' counsel were reasonable. But the court awarded the full amount requested without analyzing whether plaintiffs' efforts in 1993 and 1994 were reasonable in light of their level of success. See Hensley, 461 U.S. at 438-40, 103 S.Ct. at 1942-43. Partial success may justify only a partial fee award. See Farrar v. Hobby, 506 U.S. 103, 112-16, 113 S.Ct. 566, 574-75, 121 L.Ed.2d 494

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[2] The Supreme Court noted this principle in Pennsylvania v. Delaware Valley Citizens' Council, 478 U.S. 546, 559, 106 S.Ct. 3088, 3095, 92 L.Ed.2d 439 (1986).

(1992); Craik v. Minnesota State Univ. Bd., 738 F.2d 348, 349-50 (8th Cir.1984).

III.

We remanded this case in 1991 because some of the relief initially afforded plaintiffs violated the Eleventh Amendment, and because the State had made a prima facie showing that the permanent injunction should now be terminated. On remand, the district court appointed a Panel of Special Masters to consider the State's motion to terminate. This procedure certainly called for reasonable post-judgment monitoring. Plaintiffs could not simply walk away from the Panel's inquiry; the district court expected them to participate. Thus, as in Plyler v. Evatt, 902 F.2d 273, 281 (4th Cir.1990), "plaintiffs' counsel were under clear obligation to make the defensive effort," and in such situations, even largely unsuccessful defensive efforts may be compensable. See also Hatfield v. Hayes, 877 F.2d 717, 720 (8th Cir.1989).

However, it was up to plaintiffs to define the extent of their participation. Plaintiffs had every reason to know, before the Panel hearings began, the nature of the State's compliance efforts. Plaintiffs could have acknowledged that those efforts appeared to provide full relief and engaged in relatively passive monitoring of the State's compliance evidence to the Panel. Instead, plaintiffs fought the State at every turn, presenting their own slate of opposing experts and examples of alleged class member deprivations. Given the parameters established by our remand order, this was, in substance, the assertion of

new claims for relief. Those new claims were unsuccessful.

The Panel received evidence from November 1992 to August 1993. Forty-four witnesses testified, including eleven outside experts. The Panel issued its Report on November 14, 1994. In recommending that the permanent injunction be terminated and the case dismissed, the Panel concluded:

> In the space of twelve hard years, North Dakota has moved from an embarrassing lack of appropriate attention to its responsibilities to become a forward-looking provider of the most promising methods and mechanisms to benefit those whom it once ignored. To deny that recognition is to ignore volumes of fact and countless days, months, and years of work, not to mention expense.
>
> * * *
>
> The panel has, in its review of the record, studied plaintiffs' assertions of federal rights violations. The panel has found that the examples presented appear to be relatively isolated, unconnected incidents involving oversight, common errors in judgment, and service inconsistencies between regions. No willful or knowing acts of abuse, neglect, or deprivation of rights of class members have been left unaddressed. The State has demonstrated that its system for delivering services to persons with developmental disability no longer has inherent within it violations of the federal constitutional and legal rights of those so disabled.

This was a complete rejection of plaintiffs' position. Plaintiffs had asserted that the State was not in compliance with federal law. The Panel disagreed, in essence concluding that plaintiffs had received all the relief to which they were entitled in the lawsuit by the time of our 1991 remand. Thus, the relative success factor in the Hensley equation suggests that plaintiffs' fee award must be reduced to an amount that would compensate for the limited effort required to engage in relatively passive monitoring of the Panel proceedings. A prevailing party who aggressively seeks a greater victory and fails is entitled to a proportionally lesser fee award than a prevailing party who merely defends its victory, even if the defense is less than completely successful. See Ustrak v. Fairman, 851 F.2d 983, 990 (7th Cir.1988).

We must also consider the other key component of the Hensley equation – exclusion of "hours that are excessive, redundant, or otherwise unnecessary," 461 U.S. at 434, 103 S.Ct. at 1939-40. The State on appeal has identified numerous examples of seemingly excessive and unnecessary work, such as the time spent by attorneys with billing rates in excess of $100 per hour accompanying experts on facility tours for days on end. Cf. Halderman v. Pennhurst State Sch. & Hosp., 49 F.3d 939, 942 (3d Cir.1995). The nature of the Panel proceedings was described in a section of the Panel's fifty-five page final Report entitled "The trouble with experts":

> Each side's counsel [supported] the proposition that its expert was the correct assessor for various reasons: the other's notes were incomplete, visit too brief, methodology flawed, experience less, education less prestigious, or preparation

> for the site visit insufficiently detailed or insufficient in scope. Endless reasons were offered for discrediting the observations of an expert witness from a site visit: reviewing the Individualized Education Plans of all students in the unit first, as opposed to afterward or not at all; or talking, or not talking, to direct care staff; talking, or not talking, to classroom teachers, or special education directors, or parents, or team members, or assessors, or evaluators, or case managers, or the Qualified Mental Retardation Professional; or not looking at the actual habilitation plans of everyone at the site visited, or at the particular plan of a client interviewed there; or not interviewing any client there; or not reviewing all, or specific, work plans or training programs for clients at a day work activity; or not comparing a client's plans through time to note progress or lack thereof and whether the plan adjusts according to the circumstances; or not tracking quarterly utilization reviews of service plans.

Perhaps all this effort would have been compensable had plaintiffs persuaded the Panel or the district court that the State continues to violate federal law. But it was overkill in light of the State's persuasive evidence that the time had come to end the litigation. This necessitates a reduced fee award, because in compensating post-judgment monitoring, we must avoid creating a framework in which "the decree institutionalizes the attorney, as well as the system." Brewster v. Dukakis, 786 F.2d 16, 18 (1st Cir.1986).

We therefore conclude that the district court's fee award cannot stand. Normally, when a fee award must be

reduced, we remand for calculation of an appropriate fee, as the Supreme Court did in Hensley. But there is no need for that in this case. Plaintiffs have been paid for all their post-judgment monitoring in 1992, when the Panel was appointed and began its hearings, plus an additional $113,000 for services in 1993 and 1994. Even if plaintiffs are entitled to a reasonable expert fee,[3] we conclude that they have been fully compensated for their reasonable and necessary post-judgment efforts following our 1991 remand.

For the foregoing reasons, that portion of the district court's judgment awarding plaintiffs attorney's fees, expert fees, and costs in the amount of $202,335.15 is reversed.

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[3] The district court did not discuss and plaintiffs have made no attempt to explain why their experts were necessary for reasonable post-judgment monitoring.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-1496NDBI

Association for Retarded Citizens, et al.	*	
	*	Order Denying
Appellees,	*	Petition for Rehearing
	*	and Suggestion for
v.	*	Rehearing En Banc
	*	
Edward T. Schafer, et al.	*	
	*	
Appellants.	*	
	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 25, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Association for Retarded
Citizens of North Dakota, et al.,

Plaintiffs,

v. Civil No. A1-80-141

Edward T. Schafer, et al.,

Defendants.

MEMORANDUM AND ORDER

(Filed Oct. 4, 1993)

Plaintiffs submitted a request for payment of certain fees and expenses incurred in each of the first two quarters of 1993. Defendants have refused to pay some of the billings, and have objected to the amount claimed as to others. Plaintiffs have moved the court for an order directing defendants to pay the disputed fees and costs. In all, defendants have refused to pay $37,034 of plaintiffs' requested fees and $29,566 of plaintiffs' requested costs. Defendants have countered plaintiffs' motion with a motion of their own which asks the court to order a termination of defendants' duty to pay plaintiffs' legal fees and costs.

Defendants argue that this court abrogated the implementation order in 1990 and that there is nothing left to monitor, and thus plaintiff is not entitled to any fees or costs. To suggest that the abrogation of the implementation order in this case has removed all standards from the level of care due class members is erroneous.

The court has ordered the impaneling of a carefully selected and uniquely qualified Special Masters Panel to determine if the Department of Human Services is meeting the mandates of the applicable law; and has ordered the parties to present their evidence to that independent and objective panel, which must then make recommendations to the court. The recommendations must reflect its background of expertise in the needs of the class members and the resources available to meet those needs. Counsel for plaintiffs have no choice; they must do the work. The case is still open, and counsel for the plaintiffs owe a duty to their clients to see that their rights are protected, and to present plaintiffs' concerns to the panel.

Defendants further suggest that plaintiffs are not "prevailing parties" under the statute allowing the payment of attorneys' fees. (42 U.S.C. § 1988). This issue has been decided adversely to defendants several times. Plaintiffs prevailed at the trial; the case is now in administration of the order entered after trial; and, plaintiffs are found to be prevailing parties and entitled to reasonable fees. Defendants could have settled this case early in its history on terms more favorable to them than the eventual court order. Instead, a conscious choice was made to litigate and defendants should not now be heard to complain about the results of that decision.

The mandate of the statutes is to award "reasonable" fees and costs. 20 U.S.C. § 1415(e)(4)(B); 42 U.S.C. § 1988. A court should award attorneys' fees for all hours expended unless the time was unreasonably expended, duplicative, or manufactured. *Association for Retarded Citizens v. Olson*, 713 F.2d 1384 (8th Cir. 1983) (citing *Hensley v. Eckert*, 461 U.S. 424 (1983)).

The defendants' refusal to pay the full amount billed raises four issues. They are:

> 1. Was the time expended by plaintiffs' counsel in accompanying expert witnesses in their tour of facilities reasonable necessary trial preparation?
>
> 2. Is plaintiffs' counsel entitled to full compensation for travel time?
>
> 3. Is plaintiffs' counsel entitled to payment by defendants for time spent on legislative matters?
>
> 4. Are plaintiffs entitled to recover the amounts spent for expert witnesses?

1. Touring Time.

Defendants have stated that the time spent touring with expert witnesses is "inappropriate and non-productive time for purposes of the litigation, and, therefore, should be non-compensable." Plaintiffs' counsel claims that such activity was regarded as compensable time in prior costs awards (*Association for Retarded Citizens v. Olson*, 561 F.Supp. 495 (D.ND 1982)); that defense counsel accompanied some of the defense experts on these tours; and that the touring time allowed counsel to interview class members and discuss relevant matters with each expert. The court does not believe that it would necessarily be malpractice to fail to accompany the experts in their field visits, nor does the court believe it is necessarily frivolous. Such items as this must be left to the good judgment of counsel. Therefore, the court holds that plaintiffs should be paid for this time.

2. Rate for Travel Time.

Defendants argue that if plaintiffs' counsel are to be paid at all for travel time they should be restricted to a rate that is one-half that charged for legal work. The cases cited in support of that position, *McDonald v. Armontrout*, 860 F.2d 1456 (8th Cir. 1988) and *Craik v. Minnesota State University Bd.*, 738 F.2d 348 (8th Cir. 1984), are authority only for the proposition that the appellate court will give the district court wide latitude in determining this question. However, *Craik* cites with approval to a 7th Circuit case, *Henry v. Webermeier*, 738 F.2d 188 (7th Cir. 1984) and quotes from Judge Posner's opinion as follows: "When a lawyer travels for one client he incurs an opportunity cost that is equal to the fee he would have charged that or another client if he had not been traveling." The *Webermeier* court went on to approve an order allowing full fees for traveling. This court is in agreement with that position. If counsel were in the office he or she would be billing someone, so they are entitled to recover the "opportunity cost" incurred.

3. Billings for Legislative Matters.

Defendants object to the amounts billed for work on legislative matters, claiming that such work is not involved in this action. Plaintiffs respond with the argument that it is proper for their counsel to monitor proposed legislation to insure that it is in compliance with the rights of their clients. Plaintiffs further claim that most of the billings that involved legislative matters also involved other legal work on the case and occurred on the same billing because all this work was done on a

single trip to Bismarck. The total of the fees in this category amount to $3,487.

The court agrees with defendants that plaintiffs' interest in legislation is not a part of this action and the defendants should not have to pay for plaintiffs' lobbying efforts. The problem appears to be that plaintiffs' counsel have, at least in some instances, lumped the charges for legislative work with time spent on matters to this action. Defendants have denied payment for all of this time. To receive the compensation due them for the work done in furtherance of this action, counsel for plaintiffs must redo the billing, specifically setting out the time spent on lobbying efforts together with a commensurate percentage of the travel time, and leave those items out of the billing.

4. Expert Witness Costs.

The matter of the request to have defendants pay the full cost of plaintiffs' experts is a more difficult question to resolve. These costs cannot be assessed under the general cost statute, 28 U.S.C. § 1920. *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437 (1987). Neither can they be assessed as a part of the attorneys' fees awarded to a prevailing party. *West Virginia University Hospitals v. Casey*, 499 U.S. 83 (1991). Therefore, unless there exists other authority for awarding such fees plaintiffs should be restricted to collecting the statutory witness fees for each expert and only for the days spent testifying and reasonable travel time to and from the court. See *Casey*, supra.

Justice Scalia, writing for the majority in *Casey*, remarked in a footnote that there is such authority under the Handicapped Children's Protection Act of 1986. 20 U.S.C. § 1415(e)(4)(B). Justice Scalia reviewed the joint committee report on that act, 1986 U.S. Code and Administrative News 1798, 1808, and pointed to the statement of the joint committee on that bill which said:

> The conferees intend that the term "attorneys' fees as part of the costs include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case in the action or proceeding, as well as traditional costs incurred in the course of litigating a case.

Justice Scalia then went on to remark that "The statement is an apparent effort to *depart* from ordinary meaning and to define a term of art.

Casey at 1143, ftnte 5.

Therefore, this court has the obligation to award plaintiffs the expert witnesses fees and, pursuant to its authority, does so.

Accordingly, **IT IS ORDERED THAT:**

1. PLAINTIFFS' MOTION FOR ATTORNEY FEES AND COSTS (Doc #822) IS GRANTED ON THE CONDITION THAT PLAINTIFFS REVISE THE FEE APPLICATION AND DELETE THEREFROM ALL TIME SPENT ON LEGISLATIVE MATTERS.

2. DEFENDANTS' MOTION TO TERMINATE DEFENDANTS' DUTY TO PAY PLAINTIFFS'

ATTORNEY FEES AND COSTS (Doc #823) IS DENIED.

Signed at Washington, DC this 30 day of September, 1993.

/s/ Bruce M. Van Sickle
Bruce M. Van Sickle, Judge
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Association for Retarded Citizens of North Dakota; Lindley Black by his father, Sidney Black; Bradley Cossett, by his mother, Denise Cossett; Richard Schneiderhan, by his mother and guardian. Elmira Schneiderhan; Naomi Jordison; Timothy Jordison; Kelli Moriarty, by her mother and guardian, Jacquelyun Moriarty; Phillip Dechant, by his mother and guardian, Lois Dechant, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

A1-80-141

Edward T. Schafer, Governor of the State of North Dakota; Rod Backman, Facilities Management; Wanda Krotochzil, Superintendent of the Developmental Center at Grafton; Dr. John Rice, State Health Officer, Department of Health; Sam Ismir, Director Division of Mental Health, Department of Human Services; Sandi Noble, Director, Division of Developmental Disabilities, Department of Human Services; Reuben Guenthner, Director, Department of Vocational Education; Wayne Sanstead, Superintendent of Public Instruction; Gary Gronberg, Director of Special Education Division, Department of Public Instruction; Henry Wessman, Director, Department of Human Services; Gene Hysjulien, Director, Division of Vocational Rehabilitation, Department of Human Services; Lori Wightman; Director, Office of Program and Policy Development, Department of Human Services,

Defendants.

MEMORANDUM AND ORDER

(Filed Feb. 7, 1995)

On January 11, 1995, this Court entered an Order (Doc. # 859) dismissing the Panel of Special Masters, terminating the permanent injunction. and requiring the Plaintiffs to file, within fifteen days of the Order, their outstanding attorney fees, and separately, their outstanding statutory costs. Further, Defendants were required, within fifteen days of the filing of Plaintiffs outstanding attorney fees and costs, to present their objections. Plaintiffs filed their motion for attorney's fees and costs on January 19, 1995 (Doc. # 860) and Defendants filed their response on January 20, 1995 (Doc. # 861).

A. Attorney Fees

The Plaintiffs filed suit in Federal District Court under 42 U.S.C. § 1983 based on various civil rights violations. Attorney's fees may be awarded pursuant to 42 U.S.C. § 1988(b) which states in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the Prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Plaintiffs are the prevailing parties in this action, *See* Order dated January 11, 1995 (Doc. # 859), and are, therefore, entitled to an award for attorney's fees.

The next inquiry is the proper manner in which to determine a reasonable attorney's fee. "The most useful

starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). This is commonly known as the *Lindy* lodestar approach. *See Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3th Cir. 1973).

Plaintiffs' counsel has provided detailed billing statements establishing attorney's fees in the amount of $124,405. This includes $35,733.00 awarded in this Court's Order of June 7, 1994, in addition to $88,672.00 for the billing periods of the last two quarters of 1993, and all four quarters of 1994. After consideration of these billing statements, the Court finds that the number of hours expended and the rate applied are reasonable which justifies a loadstar figure of $124,405.

However, the product of reasonable hours times a reasonable rate does not end the inquiry. *Hensley* at 434. Courts may consider other considerations identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), commonly known as the *Johnson* factors. Such factors may lead the Court to adjust the fee upward or downward. *Hensley* at 434. After careful consideration of the *Johnson* factors and recognizing that the resulting product of the *Lindy* loadstar approach "is presumed to be the reasonable fee" (*See Blum v. Stenson*, 465 U.S. 886, 897 (1984)) there is no need to adjust the fee.

B. Expert Fees

Plaintiffs seek an award for expert fees in the amount of $57,908.04 ($29,566 from June 7, 1994 Order and $28,342.04 expended from the third quarter of 1993 to present date). Expert fees may be awarded pursuant to 42 U.S.C. § 1988(c) which provides:

> In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

Defendants are correct to point out that *West Virginia Univ. Hosp. v. Casey,* 499 U.S. 83 (1991), held that fees for services rendered by experts in civil rights litigation may not be shifted to the losing party as Part of a reasonable attorney's fee under 42 U.S.C. § 1988. However, *Casey* was decided prior to the Civil Rights Act of 1991, where Congress amended 42 U.S.C. § 1988 to expressly provide for expert fees by adding the language of subsection (c) expressed above. *See Houghton v. Sipco, Inc.,* 631 F.Supp. 631, 650 n. 16 (S.D.Iowa 1993). Thus, Plaintiffs are entitled to an award for expert fees pursuant to 42 U.S.C. § 1988(c) despite the ruling in *Casey.*

C. Costs

Plaintiffs seek an award for costs in an amount of $77,931.15, which includes the amount awarded in this Court's June 7, 1994 Order (Doc. # 849) and the amounts for the last two quarters of 1993, and all of 1994. Allowable costs are provided for in 28 U.S.C. § 1920 which provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk, and marshal;
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of this title;
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

After careful review of the Plaintiffs' list of costs expended on this case from the third quarter of 1993 to date, this Court finds that all of Plaintiffs' costs are taxable and shall be awarded in full.

D. Interest

Pursuant to it's Order of June 7, 1994 (Doc. # 849), this Court determined that the balance of due and unpaid partial fees and costs was $65,298.00 as of October 27, 1993. The Court also ordered that, subject to a forty-five day delay, measured from June 7, 1994, the unpaid balance shall bear interest at the rate of one and three-fourths percent per month compounded monthly until paid.

After further review, this Court finds that the federal statutory interest rate should be applied. *See Johnson v. N.D. Workers Comp. Bureau*, 428 N.W.2d 514, 519 (N.D. 1988). Interest on attorney's fees is governed by federal law. *MidAmerica Federal Sav. & Loan v. Shearson/American Exp., Inc.*, 962 F.2d 1470 (10th Cir. 1992). Specifically, interest is allowable pursuant to 28 U.S.C. § 1961 which states in relevant part:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment.

The applicable language is "interest shall be calculated from the date of the entry of judgment . . . " Further, it is recognized that interest on an attorney fee award runs from the date of the judgment establishing the right to the award. *Jenkins By Agyei v. State of Missouri*, 931 F.2d 1273, 1276 (8th Cir. 1991). Since it is improper to award interest prior to a judgment being entered, it would be improper for the Court to award interest from July 22, 1994 (45 days from the June 7, 1994 Order) to the date of judgment. Therefore, this Court amends that part of it's June 7, 1994 Order regarding interest on attorney's fees and costs.

IT IS ORDERED that:

(1) plaintiffs are the prevailing parties in this action and are entitled to an award of attorney's fees, including expert fees and costs;

(2) plaintiffs are awarded an amount of $202,335.15 for attorney's fees and costs. This amount includes an award of $57,908.04 in expert fees. Interest shall accrue on the total amount of $202,335.15 at a rate in accordance with 28 U.S.C. § 1961 from the date judgment is entered;

(3) this Court amends its June 7, 1994 Order (Doc. # 849) with respect to the award of interest in that no prejudgment interest shall be awarded to plaintiffs.

Dated this 3rd day of February, 1995

/s/ Bruce M. Van Sickle
Bruce M. Van Sickle, Judge
United States District Court